SUPREME COURT, U. S.

AUG 30 1967

JOHN F. DAVIS, CLERK

No. 52

In the Supreme Court of the United States

OCTOBER TERM, 1967

S. EDWARD BLOOM,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF FOR S. EDWARD BLOOM, PETITIONER

ANTHONY BRADLEY EBEN
One North La Salle Street
Chicago, Illinois 60602

HERBERT F. FRIEDMAN
188 W. Randolph Street
Chicago, Illinois 60602
Counsel for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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OPINION BELOW

The Opinion of the Supreme Court of the State of Illinois (R. 113-118) is reported 35 Ill. 2d 255, 220 N.E. 2d 475.

JURISDICTION

The judgment of the Supreme Court of the State of Illinois was entered on September 23, 1966. (R. 118, 119) The time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark of this Court on December 20, 1966 to February 18, 1967. The petition was filed on

February 16, 1967 and was granted on April 17, 1967. Jurisdiction in this Court is conferred by 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States:

Article III, §2. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .—"

Amendment V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person be * * * deprived of life, liberty or property, without due process of law * * *"

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation * * *."

Amendment XIV, §1. "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Illinois:

Article II, Section 5, "The right of trial by jury as heretofore enjoyed shall remain inviolate * * *."

Article II, Section 9, "In all criminal prosecutions, the accused shall have the right to * * * a speedy public trial by an impartial jury * * *."

Illinois Criminal Code of 1961. (S.H.A. Ch. 38):

Section 1-3 "No conduct constitutes an offense unless it is described as an offense in this Code or another statute of this State. However, this provision does not affect the power of the court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment or decree."

Section 1-7 (e). "All sentences to the penitentiary shall be for an indeterminate term. * * *"

Section 1-7 (f) "All sentences of imprisonment other than to a penitentiary shall be for a definite term which shall not exceed one year."

Section 1-7 (j). "The court in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided may sentence the offender to a term of imprisonment not to exceed a year or a fine not to exceed $1,000 or both."

Section 2-7. "'Felony' means an offense punishable with death or by imprisonment in the penitentiary."

Section 2-11. "'Misdemeanor' means any offense other than a felony, and includes conduct prohibited by a statute which provides no penalty for its violation."

Section 2-12. "'Offense' means a violation of any penal statute of this State."

Section 17-3. (a) "A person commits forgery when, with intent to defraud, he knowingly:

(1) Makes or alters any document apparently capable of defrauding another in such manner that it purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority; or

(2) Issues or delivers such document knowing it to have been thus made or altered; or

(3) Possesses, with intent to issue or deliver, any such document knowing it to have been thus made or altered.

(b) An intent to defraud means an intention to cause another to assume, create, transfer, alter or terminate any right, obligation, or power with reference to any person or property.

(c) A document apparently capable of defrauding another includes, but is not limited to, one by which any right, obligation or power with reference to any person or property may be created, transferred, altered or terminated.

(d) Penalty. A person convicted of forgery shall be fined not to exceed $1,000 or imprisoned in the penitentiary for one to 14 years or both."

Section 103-6. "Every person accused of an offense shall have the right to a trial by jury unless understandingly waived by defendant in open court."

Section 115-1. "All prosecutions except on a plea of guilty shall be tried by the court and a jury or the court when a jury is waived by the defendant in open court."

Statutes of the United States:

Title 18 U.S.C. § 1. "Notwithstanding any Act of Congress to the contrary:

1. Any offense punishable by death or imprisonment to a term exceeding one year is a felony.

2. Any other offense is a misdemeanor.

3. Any misdemeanor, the penalty for which does not exceed imprisonment for a period of 6 months or a fine of not more than $500 or both, is a petty offense."

Title 18 U.S.C. § 402. "Any person, corporation or association willfully disobeying any lawful writ, proc-

ess, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both."

"* * * * * *"

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevaling usages at law."

Title 18 U.S.C. §. 3691. "Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to a trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful

writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

QUESTIONS PRESENTED

1. Is a defendant in a State Court trial for criminal contempt entitled under the Fourteenth Amendment to the Constitution of the United States to a trial by jury particularly where the conduct alleged as contempt is not petty or trivial but is a felony under the law of the State?

2. Do not *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966) and the Fourteenth Amendment to the Constitution of the United States require jury trials in State Court criminal contempt proceedings where the sentence imposed amounts to two years?

3. Is a State Court in imposing a sentence for criminal contempt limited by the Fourteenth Amendment to the Constitution of the United States to such sentence as it could impose only for petty offenses under the law of the State?

4. Does not the Fourteenth Amendment to the Constitution of the United States prohibit a State Court trial judge presiding at a contempt trial from conducting a private investigation into an alleged contemner's conduct and receiving a secret report with respect thereto *in camera* prior to such trial?

5. Does not the comment of a State Court prosecutor on the failure of an accused to take the stand in his own behalf deprive the accused of his rights to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT[1]

1. This matter arose in the Probate Division of the Circuit Court of Cook County, Illinois, upon the amended petition of the State's Attorney of that County charging petitioner with conduct claimed to constitute a criminal contempt of that Court. (R. 44-46). The conduct relied upon as the basis for this charge was the alleged preparation of a spurious Will of one William A. Melody by petitioner and its subsequent presentation by him for admission to probate when he knew that such Will had been prepared and then falsely executed and witnessed after Melody's death. (R. 45, 46).

This same conduct, if true, was in violation of the provisions of Section 17-3 of the Illinois Criminal Code of 1961 and punishable by a sentence of 1 to 14 years and/or a fine not to exceed $1,000. S.H.A. Ch. 38 § 17-3. No proceeding, however, was instituted by indictment against petitioner under the Criminal Code. In such event, petitioner would have been entitled to a jury trial. Illinois Constitution, Art. II §§ 5, 9; S.H.A. Ch. 38; §§ 103-6, 115-1.

The issues posed by the amended petition could not be tried summarily, nor were they, since the resolutions of such issues depended upon proof by respondent of facts relating to the preparation, execution and witnessing of the Will outside the presence, constructive or otherwise, of the trial court and therefore beyond its personal knowledge and observation.

When the cause came on for full trial, petitioner timely moved for a jury trial which motion was denied. (R. 78).

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[1] This cause involves three separate claims by petitioner of denials of constitutional rights. In order to more clearly delineate these claims, the facts are set forth separately with respect to each in this Statement.

During the trial, petitioner offered testimonial evidence which was received and which raised a question of fact as to his malevolent intent, a necessary element of criminal contempt under Illinois law. (R. 97-112).[2] After hearing all the evidence at a trial lasting approximately ten days, the trial court found petitioner's conduct in the above respects to be in derogation of the Court's dignity and its orderly processes. (R. 70). It thereupon adjudged petitioner in criminal contempt and sentenced him to the Cook County jail for a period of 24 months. (R. 70).

2. Approximately three months prior to the filing of respondent's amended petition (R. 44), the trial court upon a petition of an heir claimed under a prior Melody Will (R. 5-16) appointed one Fink, as *amicus curiae* in this Estate (R. 17). Under the terms of this order of appointment, Fink was authorized and empowered to investigate all matters pertaining to the preparation, execution and filing of the Melody Will presented by petitioner and to prosecute any fraud which he discovered attending same and to make "full report to the Court from time to time." (R. 17, 18).

Approximately 60 days before the amended petition was filed by respondent against petitioner, the trial court entered its order on Fink to file instanter his report covering the investigation which he had conducted up to that date (R. 36). This report was filed with the trial court itself and remained continuously in its own possession despite petitioner's efforts to examine it prior to trial. (R. 64, 65, 80, 81). In this connection, the trial court entered an order granting petitioner full excess to the files and court records in the Estate which it had

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[2] *People* v. *Koniecki*, 28 Ill. App. 2d 488 (1961); *People* v. *Hille*, 192 Ill. App. 139 (1915).

theretofore impounded but did not disclose that it had withheld therefrom the Fink report. (R. 68, 69).

At the trial, petitioner was permitted limited examination of this report and only insofar as it bore upon the testimony of those witnesses testifying for respondent and as an aid to the cross-examination of such witness. (R. 80, 81). Fink was not called as a witness by the respondent. After judgment, the trial court denied petitioner's motion to turn the Fink report over to the Clerk of the Court in order for it to be made part of the record on petitioner's appeal to the Illinois Supreme Court. (R. 75-77).

3. After presentation of all the evidence, the States Attorney in his summation commented on the failure of petitioner to testify in his own behalf. (R. 112). On objection by petitioner, the trial court ruled such comments to be proper argument. (R. 112).

ARGUMENT

I.

THE DENIAL OF A JURY TRIAL TO PETITIONER ON A CHARGE OF CRIMINAL CONTEMPT AMOUNTING TO A FELONY AND FOR WHICH HE WAS SENTENCED TO 2 YEARS IN JAIL CONTRAVENED HIS RIGHTS UNDER ARTICLE III § 2 OF THE CONSTITUTION OF THE UNITED STATES AND THE FIFTH AND SIXTH AMENDMENTS THERETO AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT.

In *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966) six members of this Court rejected a constitutional claim of right to trial by jury arising in a federal criminal contempt case in which a sentence of 6 months was imposed for disobedience of a court order. *Cheff,* pp. 375-386. Unlike the case at bar, the conduct there charged did not amount to a felony. Two members of the Court dissented on the grounds that a jury trial was constitutionally required.[3] *Cheff,* pp. 384-393. At the same time, by combination of the views of four members of the majority with those dissenting, it was held that sentences exceeding 6 months for criminal contempts may not be imposed by federal courts absent a jury trial or waiver thereof. *Cheff,* pp. 380, 384-393. As a result of this combination, it appears that this Court has taken a long stride forward in the direction of what has been described by Mr. Justice Black in his dissent in *United States* v. *Barnett,* 376 U.S. 681, 727 (1964) as:

> "* * * ultimate judicial obedience to the doubly proclaimed constitutional demand that all people charged with crime, including those charged with criminal contempt, must be given a trial with all the safeguards

[3] Mr. Justice White did not sit in *Cheff.*

of the Bill of Rights, including indictment by Grand Jury and trial by jury."

In reaching these holdings and dissents therefrom, the following diverse views of various members of this Court appear as follows:

1. Four Justices, (The Chief Justice and Mr. Justices Clark, Brennen and Fortas), pointed out that jury trials are not constitutionally required in prosecutions of federal petty offenses which are defined by 18 U.S.C. 1 as being any misdemeanor, the penalty for which does not exceed 6 months. Cheff pp. 379, 380. In their view, proceedings in criminal contempts are the equivalent of such prosecutions and therefore no different treatment of them is warranted or should be accorded. Because of this, they concluded that no right to trial by jury was guaranteed by the Constitution in criminal contempts where the sentences imposed did not exceed 6 months. On the other hand, these Justices, in accordance with the sense of the *dictum* set forth in *United States* v. *Barnett*, 376 U.S. 681, 695 (1960), ft. note 12, held that a jury trial is required in criminal contempts before sentences in excess of 6 months may be imposed. Necessarily, this view was based on constitutional grounds because the *Barnett dictum* was so grounded and because denial of a jury trial in cases resulting in sentences of more than 6 months could not be constitutionally justified by the device of equating criminal contempts to petty offenses.[4]

2. Two Justices, (Mr. Justice Douglas and Black), adhered to their prior views as set forth in the dissents in

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[4] Mr. Justice Douglas apparently agrees with petitioner's views in this respect since in his dissent he states that the prevailing opinion "studiously avoids embracing the view expressed by Mr. Justice Harlan (ante, at 381), that in no event does the Constitution require a jury trial for contempt." *Cheff*, p. 387.

Green v. *United States*, 356 U.S. 165, 193 (1958) and *United States* v. *Barnett*, 376 U.S. 681, 724, 728 (1964) that a criminal contempt is a "crime" within the meaning of Article III, § 2 of the Constitution and a "criminal prosecution" within the meaning of the Sixth Amendment both of which guarantee the right to trial by jury in such cases. *Cheff* 384.[5] In this connection, these Justices would not concede the validity of limiting the right to only serious, and not petty, contempts. As to this, Mr. Justice Douglas stated, *Cheff* p. 391:

> "So long as all contempts are lumped together, the serious nature of some contempts and the severity of the sentences commonly imposed in such cases control the legal character of *all* contempts. None can be regard as petty." (Emphasis supplied.)

Accordingly the minority held that unless and until Congress carved out classes of petty contempts a jury trial is required in all criminal contempt cases. *Cheff* p. 391, 392. In addition, these Justices felt that even if such a distinction could be drawn on the basis of seriousness or pettiness, it could be ascertained only by inquiry into the nature of the offense and the potential penalty rather than by reference to the amount of punishment actually imposed which they regarded as irrelevant. *Cheff* p. 386-393.

3. Two Justices, (Mr. Justices Harlan and Stewart), relying on *Green* and a number of decisions dating back

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[5] These dissents were based on exhaustive considerations of the Magna Carta, the Constitution of the United States and the Bill of Rights, the Declaration of Independence, the Constitution and Laws of the Original 13 States, early English and Colonial common law decisions and Blackstone's Commentaries. Those considerations resulted in the conclusion that there is "no justification, either in the history or policy of criminal contempt or in the history and policy of the Constitution for treating criminal contempt differently from other 'crimes' or 'criminal prosecution'." *Barnett*, p. 756.

to 1888, held that a prosecution for criminal contempt was not subject to trial by jury under any circumstances under Article III, § 2 of the Constitution and the Fifth and Sixth Amendments. *Cheff* p. 381-383.

It is evident from the various opinions in *Cheff*, as shown above, that their now exists on this Court a majority which on constitutional grounds alone would require a jury trial in a federal contempt matter similar to the case at bar.[6] Thus, Mr. Justices Douglas and Black would so hold simply because the charge was one of criminal contempt whereas the Chief Justice and Mr. Justices Clark, Brennen and Fortas would require such a jury trial because the offense here charged was not equivalent to a petty offense since it was punished by a 2 year sentence.

Upon his appeal to the Supreme Court of Illinois, petitioner relied heavily on *Cheff* in support of his contention that the denial of his demand for a jury trial in a serious contempt matter on a charge amounting to a felony and his subsequent sentence herein of 2 years contravened his constitutional rights under Article III § 2 of the Constitution and the Fifth and Sixth Amendments as applied to the States by the Fourteenth Amendment.[7] He also asserted in that Court and reasserts here that the reasoning of *Cheff*, as above shown, presently requires trial by jury in

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[6] Actually, the question here presented relating to trial by jury could not arise federally under the circumstances here in view of 18 U.S.C. §§ 402 and 3691 providing for trial by jury where the contempt charged is of such a character as to constitute a criminal offense under any statute of the United States or under the laws of any State in which the act was committed. See *Michaelson* v. *United States Ex Rel Chicago, Illinois, St. Paul, Minneapolis and Omaha Railway Company*, 266 U.S. 42 (1942).

[7] Similar constitutional assertions were also made under Article II, §§ 5 and 9 of the Constitution of the State of Illinois.

all Illinois criminal contempt cases regardless of the length of sentence imposed. This follows from the fact that in Illinois there are only two classes of offenses, *i.e.*, felonies and misdemeanors. S.H.A. Ch. 38 §§ 2-7, 2-11, 2-12. The right to trial by jury in both of these classes is unconditionally guaranteed by Article II §§ 5 and 9 of the Constitution of the State of Illinois as well as by statute. S.H.A. Ch. 38 §§ 103-6, 115-1. However, there is no statutory provision in Illinois comparable to 18 U.S.C. 1 and no body of decisions permitting the trial of petty offenses without a jury. For these reasons, the equation by which the Chief Justice, and Mr. Justices Clark, Brennen and Fortas justified the denial of a jury trial in *Cheff* is not here available and the distinction between their views and those of Mr. Justices Douglas and Black in the premises evaporates.

The Supreme Court of Illinois found no merit in any of petitioner's arguments and affirmed his conviction. In so doing, it flatly rejected this Court's reasoning in *Cheff*, stating in this connection, (R. 114, 115):

> "A test which would make the right to a jury trial depend upon whether the contemnor's conduct was serious or pretty—or a rule which would limit the penalty which could be imposed, simply because a jury trial was not had or waived—would lead to nothing but incongruity and confusion, and would have no relation whatever either to the nature of the proceeding or to the purpose of trial by jury."

The Supreme Court of Illinois has thus refused to follow *Cheff* and refuses to recognize the important modifications it has imposed on *United States* v. *Barnett*, 376 U.S. 681 (1964) and *Green* v. *United States*, 356 U.S. 165 (1958). Instead, it chose to rely on both of those outmoded cases as the last of a long line of decisions establishing that "criminal contempts are not subject to jury

trial as a matter of constitutional right" and that "the exercise of summary contempt power is not restricted to offenses that may be classified as 'trivial' or 'petty' * * *". (R. 115, 116).

Petitioner urged in the Court below and does so here again that reliance on these cases under the circumstances of the instant case is misplaced because virtually all such cases dealt with contempts arising either because of willful violations of a duty created or declared by a court order or because of contumacious acts amounting to misconduct committed in the presence of the court which impeded its dignity and amounted to direct contempts because of the personal knowledge of the court of the facts thus requiring neither notice nor evidence. *Ex Parte Terry*, 128 U.S. 288, 299, 300 (1888); *Ex Parte Grossman*, 267 U.S. 87 (1925); *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418 (1911).[8]

It is, of course, quite true that inherent power to punish for contempt exists in courts in order to protect them from insults and oppression while in the ordinary exercise of their duties, and to enable them to enforce their judgments and orders necessary to the due administration of law. *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 333 (1904). In other words, the power exists, to the extent it exists, only as an *essential incident* to the maintenance by courts of their authority and in the administration and execution of their judicial powers. *Ex Parte Terry*, 189 U.S. 302, 303, (1888). It is urged that this inherent power should exist and be exercised only where it

[8] All of the cases referred to by Mr. Justice Harlan in his opinion in *Cheff* as authority for the proposition that criminal contempts are not triable by jury under the Constitution fall within this classification. Not one dealt with conduct amounting to the commission of a crime committed outside the presence of the Court and thus requiring proof of independent facts.

is essential, otherwise, the reason for its existence falls. In this respect, courts' authority over contempts is said to be limited "to the least possible power adequate to the end proposed". *Anderson* v. *Dumne,* 6 Wheat (U.S.) 204, 231 (1821); *In re Michael,* 326 U.S. 224, 227 (1945); *In re Oliver,* 333 U.S. 257, 274 (1948). This Court in *Re Oliver,* p. 274, thought that the exercise of the contempt power should not be expanded beyond "the suppression and punishment of the court-disrupting misconduct which alone justified its exercise."

In the case at bar, the exercise of the power is not essential because the contempt involved constitutes a serious crime and the court's functions are afforded adequate protection by the institution of proper criminal proceedings.[9]

Further, the reasonableness and justice of requiring criminal contempts of the sort charged in the instant case to be tried only as crimes under all the constitutional safeguards of the Bill of Rights is best demonstrated from the fact that even in those cases where courts exercise their inherent powers to enforce their decrees and processes, and to protect their dignity, many protections and immunities are already afforded the accused. Thus, it is held under federal and Illinois decisions that he is entitled

[9] Query whether it is not time for this Court to assert that prosecutions for criminal contempts which also constitute criminal offenses are never proper, particularly when not committed in the presence of the Court? At present, the contemnor may be prosecuted and punished twice for the same conduct since it is held federally that the double jeopardy provisions of the Fifth Amendment have no application to prosecutions for criminal contempts. *O'Malley* v. *United States,* 128 F. 2d 676, 684 (C.A. 8, 1942), reversed on other grounds, *Pendergast* v. *United States,* 317 U.S. 412 (1943). The law in Illinois appears to be similar although there are no cases directly in point. *People* v. *Flaherty,* 396 Ill. 304 (1947).

to the presumption of innocence, proof beyond reasonable doubt, need not testify against himself, advice as to the charges against him, a reasonable opportunity to prepare a defense, assistance of counsel, an impartial arbiter of the facts, benefit of statutes of limitations governing crimes, and the right to a pardon. *Gompers* v. *Bucks Stove and Range Co.,* 221 U.S. 412, 443, 446, 448 (1911); *Gompers* v. *United States,* 223 U.S. 604, 601 (1914); *Ex Parte Grossman,* 267 U.S. 87, 115, 118 (1925); *In re Murchison,* 349 U.S. 133 (1955); *Cook* v. *United States,* 267 U.S. 517 (1925); *People* v. *Skar,* 30 Ill. 2d 491 (1964); *People* v. *Spain,* 307 Ill. 382 (1923).

As heretofore noted, the Supreme Court of Illinois determined petitioner's claim of deprivation of his constitutional right to a jury trial by reliance on decisions of this Court. Thus, tacitly, at least, it recognizes the applicability of pertinent provisions of the United States Constitution to the questions here involved under the Fourteenth Amendment. In any event, petitioner submits that the Fourteenth Amendment provides him with protection here, particularly insofar as the Sixth Amendment is concerned. *Pointer* v. *Texas,* 380 U.S. 400, 403, 406 (1965). In this connection it is pointed out that this Court in recent years has more and more construed the Fourteenth Amendment as incorporating the Bill of Rights. *Griffin* v. *California,* 380 U.S. 609 (1965); *Estes* v. *Texas,* 381 U.S. 532 (1965); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). This principle was first annunciated by Mr. Justice Black in his dissent in *Adamson* v. *California,* 332 U.S. 46, 68 (1947). In 1965, *Adamson* was expressly overruled by *Griffin* indicating the minority view is tending to become that of the majority. In the October, 1966 term of this Court, provisions of the Bill of Rights were applied to the States in at least nine decisions. *Long* v. *Iowa,* 17 L. Ed. 2d 290; *Sims* v. *Georgia,* 17 L. Ed. 2d 593;

Whitus v. *Georgia,* 17 L. Ed. 2d 599; *Miller* v. *Pate,* 17 L. Ed. 2d 690; *Spect* v. *Patterson,* 18 L. Ed. 2d 326; *Clewis* v. *Texas,* 18 L. Ed. 2d 423; *Anders* v. *California,* 18 L. Ed. 2d 493; *Re Gault,* 18 L. Ed. 2d 527; *Berger* v. *New York,* 18 L. Ed. 2d 1040; *Washington* v. *Texas,* 18 L. Ed. 2d 1019.

The right to jury trials and the safeguards which they long afforded have been extensively discussed in the dissents in *Barnett,* pp. 725, 726, 759; 760; and *Green,* pp. 199, 201, 209, 210. Regard for constitutional liberty requires that these safeguards be imposed on the States under the Fourteenth Amendment.

II.

THE PRETRIAL INVESTIGATION OF PETITIONER BY THE TRIAL COURT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL GUARANTY OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner's claims that the action of the trial judge in investigating petitioner's conduct and in receiving a secret report relative thereto *in camera,* all prior to the institution of any proceeding against petitioner, deprived petitioner of his constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. In support of this contention petitioner relies on *In re Murchison,* 349 U.S. 133, (1955), and *Re Oliver,* 333 U.S. 257 (1945), cases not squarely in point on the facts but pertinent and controlling, it is urged, on the principles announced. In *Murichison,* this Court held it to be a violation of the Due Process Clause for a state court to try in contempt proceedings a witness it had called before it when it was acting as an investigative one-man grand jury. In so determining the Court stated, p. 136:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter of due process of law.' *Tumey* v. *Ohio,* 273 U.S. 510, 532, 71 L. ed. 749, 758, 47 S. Ct. 437, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 99 L. ed., 75 S. Ct. 11."

and at p. 138, this Court stated:

> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings."

The Supreme Court of Michigan was thereupon reversed.

All of the above poses the due process question of whether a court which has itself, through its own arm, investigated a criminal contempt prior to trial can be expected to erase inferences and conclusions arising from matters learned during the investigation. Will it be able to make any nice distinction between preponderance of

evidence and proof beyond reasonable doubt as required in criminal contempt trials? If the evidence on the criminal contempt charge is different from that which it learned of through its investigation, will it be able to expunge from mind or memory that which it learned of prior to trial? And how could anyone know, particularly since the trial court refused to release the entire Fink report so that it could be made part of the Record on Appeal?

The Supreme Court of Illinois was not responsive to these contentions. In this connection, it stated, (R. 116, 117).

> "The Record does not show, nor does the defendant indicate, how the report and its presentation to the judge worked any prejudice or harmed him in any way. The appointment of an *amicus curiae* to make an investigation as heretofore been recognized as proper, (*People* v. *Goss,* 10 Ill. 2d 533) and the evidence, all of which was heard in open court, not only is able to sustain the finding but is largely undisputed by defendant."

This statement of the Supreme Court of Illinois appears to be wrong for three separate reasons. Firstly, as pointed out above, the trial court's actions in refusing to make the report part of the Record effectively prevented petitioner from making a showing that the balance of the report, which was not made available to him, did prejudice him. Secondly, petitioner never contended that the appointment of *amicus curiae* was not proper. His argument ran to the use by the trial court of the report after it had been prepared. Thirdly, petitioner did not dispute the finding in the Supreme Court of Illinois, only because, as he there stated, on appeal the evidence had to be viewed in the light most favorable to respondent. Petitioner has

also contended that the psychiatric evidence given in his behalf raised a serious fact question as to his guilt.

III.

THE PROSECUTOR'S COMMENT ON THE FAILURE OF PETITIONER TO TESTIFY IN HIS TRIAL ON JURY CONTEMPT WAS PREJUDICIAL ERROR AND VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner maintains that the comment of the prosecutor as to his failure to testify, even though made in a non-jury case, violated petitioner's constitutional rights under the Fourteenth Amendment. In support of this contention, petitioner relies on *Griffin* v. *California,* 380 U.S. 609 (1965), flatly holding that the self-incrimination guaranty of the Fifth Amendment in its bearing on the states by reason of the Fourteenth Amendment, forbids comment by the prosecution as to accused's silence. In so doing, it relied on the following reasoning in *Wilson* v. *United States,* 149 U.S. 60 (1893), which has particular cogency here in view of petitioner's psychiatric testimony. In *Wilson,* this Court stated at p. 66:

> "* * * The act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly

be placed on the witness stand. The statute, in tenderness to the weakness of those, who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."

Petitioner, of course, is aware of this Court's modification of *Griffin* in *Chapman* v. *California,* 17 L. ed. 2d. 705 (1967). He urges, however, that the error here complained of cannot be held to be "harmless beyond reasonable doubt", *Chapman,* 17 L. ed. 2d. at p. 711, since the trial judge considered the prosecutor's comment to be proper argument which the court thought merited reply by the petitioner. (R. 112, 113) Obviously, the trial court must have accorded weight to the inferences flowing from the prosecutor's improper comment which, of course, offends the *Griffin* decision.

CONCLUSION

It is apparent that this Court now views a jury trial as being constitutionally required in all federal cases of criminal contempt amounting to serious offenses. Here, the criminal contempt with which petitioner was charged was a felony under the Illinois Criminal Code of 1961. Because of the traditional and revered safeguards inherent in jury trials, particularly where crimes are tried as contempts, the rule now prevailing in this Court should be applied to the States under the Fourteenth Amendment. Solely because petitioner was denied a trial by jury, the case at bar should be reversed and remanded for a new trial in which petitioner would be accorded the full protection of the Constitution of the United States.

Moreover, petitioner points out that he was also denied other rights under the Constitution. Each of these denials of themselves should require reversal and remandment. In the aggregate, they evidence the complete disregard in the trial court of petitioner's constitutional rights and the unfairness of his trial there.

Respectfully submitted,

ANTHONY BRADLEY EBEN
HERBERT F. FRIEDMAN
Counsel for R. Edward Bloom, Petitioner